Supreme Court, U. S.
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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1974

No. 74-737

LEROY HOOD .....PETITIONER

VS:

COMMONWEALTH OF KENTUCKY....RESPONDENT

ON PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF KENTUCKY

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

ED W. HANCOCK
Attorney General

MILES H. FRANKLIN
Assistant Attorney General
Capitol Building
Frankfort, Kentucky 40601

COUNSEL FOR RESPONDENT

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BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

OPINION BELOW

The opinion below from the Kentucky Court of Appeals is a Memorandum Opinion, not to be cited as authority, and is reported at 512 S.W.2d 528 (1974) and is correctly set forth in the petitioner's Appendix A, pages 15-16, of his Petition for Writ of Certiorari.

JURISDICTION

Petitioner's application to invoke the jurisdiction of this Court should be denied because it fails to meet the jurisdictional requirements of 28 U.S.C. §1257(3), the proper provision for review of a state court judgment in a criminal case on certiorari.

The petitioner premises his petition for a writ of certiorari upon four contentions which he argues reflect a violation of his constitutional rights under the Fourth and Fourteenth Amendments.

Respondent submits that for purposes of jurisdictional clarity, the questions found under the heading of "Questions Presented" in petitioner's petition, can be logically simplified and restated into two contentions. Questions I, II, and III can be combined into the contention (1): Whether a police officer can examine an automobile for a vehicle identification number, whether hidden (Confidential Vehicle Identification Number [CVIN] or plainly visible (Public Vehicle Identification Number [PVIN]), without violating the search and seizure rights of the Fourth Amendment where he has legitimate grounds for doing so, not amounting to probable cause? Question IV can be rephrased into the contention (2): Whether a person charged with the thievery of a stolen motor vehicle has standing to object to the warrantless "search" of the vehicle identification number (VIN) of that stolen vehicle?

The respondent respectfully disagrees with petitioner's contentions and submits that petitioner's petition for writ of Certiorari be denied.

(1) To contend that examining and copying of a vehicle identification serial number by a police officer of a properly impounded motor vehicle is a search thereof in violation of the Fourth Amendment is without substance. See *United States v. Graham*, 391 F.2d 439 (6th Cir. 1968). At the time of the arrest of the petitioner for

disorderly conduct and resisting arrest, the arresting officer learned from a companion police officer that the truck had been stolen. After the truck had been impounded at the tow-in lot, he routinely entered the door post serial number (PVIN) and license plate number into the National Crime Information Center (N.C.I.C.), the response to which negated theft. The arresting officer subsequently copied the secret serial number (CVIN) from underneath the chassis' frame and a computer check confirmed the officer's anticipation of a stolen vehicle.

In the case at bar, nothing from the interior of the vehicle and no personal effects, which the Fourth Amendment traditionally has been deemed to protect, were searched or seized and introduced into evidence.

Petitioner contends that the decision below collides and conflicts with the rulings of *Carroll v. U.S.*, 267 U.S. 132, 69 L.Ed. 543, 53 S.Ct. 280 (1925); *Chambers v. Maroney*, 399 U.S. 42, 26 L.Ed.2d 419, 90 S.Ct. 1975 (1970); *Coolidge v. New Hampshire*, 403 U.S. 443, 29 L.Ed. 2d 564, 91 S.Ct 2022 (1971). Such is not the case.

Coolidge, supra, involved an extensive search of the entire vehicle including the interior from which, by vacuum sweepings, incriminating evidence was obtained. *Coolidge* is inapposite because it involved the warrantless search of an automobile carried out pursuant to a criminal investigation where the only conceivable purpose of such an investigation was the discovery of instrumentalities of the crime. A search of that kind raises different and additional considerations not present in the copying of a ve-

hicle identification number for which there was no reasonable expectation of privacy. The vehicle identification number in itself is not evidence of a crime, but it may lead to the identity of the true owner.

Petitioner's reliance on the underlying rationale of the *Carroll-Chambers* line of decisions, is without merit because clearly the vehicle being operated by petitioner was lawfully impounded and in proper police custody. There were no exigent circumstances so as to bring into consideration the decisions of *Carroll* or *Chambers,* supra. The prior impoundment of the vehicle was not a constitutional barrier to the copying of its CVIN and its use to determine thievery. Again, we are not confronted with any issue as to the propriety of a search of a car's interior.

Stated simply, this is not a significant case of a citizen's invasion of privacy or unwarranted intrusion into that constitutionally protected area. Here, the invasion, "... if it can be said to exist, is abstract and theoretical." *Air Pollution Variance Board v. Western Alfalfa Corp.*, ——— U.S. ——— ———, 40 L.Ed.2d 607, 611, 94 S.Ct. ——— ——— (1974).

Numerous federal cases have held that the examination of an automobile for purposes of identifying it may be conducted within certain limits by a police officer having a legitimate ground for doing so, not amounting to probable cause, without violating Fourth Amendment's rights, *U.S. v. Williams,* 434 F.2d 681 (5th Cir. 1970). Some of these cases have been decided on the theory that an examination of a vehicle identification number, although necessitating an opening of the door, is not a

search at all. See *Cotton v. U.S.*, 371 F.2d 385 (9th Cir. 1967). Others hold that such an entry is a search but one justified because of the limited intrusion and the quasi-public nature of the identification number, *U.S. v. Powers*, 439 F.2d 373 (4th Cir. 1971).

This Court concluded in *Cardwell v. Lewis*, ____ U.S. ____, 41 L.Ed. 2d 325, 94 S.Ct. ____, 1974, that the probable cause examination of the exterior of the vehicle and taking of paint scraping therefrom were reasonable and that this action did not invoke the right to privacy which the interposition of a warrant requirement is meant to protect.

The ruling of the Kentucky Court of Appeals that there was no search where the only intrusion was to read the hidden identification serial number in order to determine ownership is in solid accord with the vast weight of Federal authority. This ruling does not necessitate the discretionary exercise of this Court's review by certiorari.

(2) Petitioner contends that he has "standing" to invoke his Fourth Amendment rights so as to suppress the hidden vehicle identification number that was copied and used to determine that he was operating a stolen vehicle in violation of state law. With regard to the issue of "standing" of a thief to raise constitutional issues of search and seizure, petitioner argues that this issue has not heretofore been decided by this Court. This contention is without foundation.

The mere presence of a search and seizure question without more, is insufficient to warrant review by certiorari. In order for such an issue to fall within the scope

of review proffered by a writ, the question must be novel, unsettled, or a conflict of decisions must exist. None of the above grounds are applicable. The decision of the Kentucky Court of Appeals was adequately supported by the Kentucky cases of *Iles v. Commonwealth*, Ky., 476 S.W. 2d 170 (1972); *Pruitt v. Commonwealth*, Ky., 286 S.W. 2d 551 (1956); *Commonwealth v. Johnson*, Ky., 420 S.W.2d 103 (1967); the latter case citing *Jones* v. United *States* 362 U.S. 257, 4 L.Ed.2d 697, 80 S.Ct. 725 (1960). These Kentucky decisions are not in conflict with *Jones*, supra. *Jones* liberalized the "standing" requirement significantly, mitigating its earlier harshness. It conferred "automatic" standing on one charged with illegal possession, thereby permitting him to challenge the seizure of those goods, the possession of which was the gravamen of the offense. *Jones* explicibly broadened the class of persons protected by taking the "standing" which was already available to persons who had a proprietary or possessory interest in the premises and extending it to all who are legitimately upon the premises. *Jones*, 362 U.S. at 267, 4 L.Ed.2d at 406, 80 S.Ct. at 734, stated:

> . . . No just interest of the government in the effective and rigorous enforcement of the criminal law will be hampered by recognizing that anyone legitimately on premises where a search occurs may challenge its legality by way of a motion to suppress, when its fruits are proposed to be used against him . . .

Significantly for present purposes, the language of *Jones* then immediately underscored its measured use of the adverb "legitimately" by standing the converse:

> *. . . This would of course not avail those who, by virtue of their wrongful presence, cannot invoke the privacy of the premises searched . . .* (Emphasis supplied)

It is the "legitimately on the premises" aspect of the petitioner's relationship to the automobile "search" that concerns us in the case at bar. In interpreting the "legitimately on the premises" aspect of *Jones*, the Kentucky Court of Appeals has denied "standing" to trespassers in or upon real property. *Smith v. Commonwealth*, Ky. 375 S.W.2d 242 (1964); *Combs v. Commonwealth*, Ky., 341 S.W.2d 774 (1961). This rationale applies with equal vigor to the thief of the stolen automobile. The overwhelming weight of federal authority and reasoning of sister states squarely hold that the thief has no "standing" in the stolen automobile. See *State* v. *Cohn*, Fla. App., 284 So.2d 426 (1973); *Palmer* v. *State*, Md., 286 A.2d 572 (1972); *State* v. *Pokini*, 45 Haw. 295, 367 P.2d 499 (1961); *Slyter* v. *State*, 246 Miss. 402, 149 So. 2d 489 (1963); *Harper* v. *State*, 84 Nev. 233, 440 P.2d 893 (1968); *State* v. *Edmonds*, *Mo.*, 462 S.W. 2d 782 (1971); *Kaufman* v. *U.S.* 323 F. Supp. 623 (E.D. Mo. 1971); *Meade* v. *Cox*, 310 F.Supp. 233 (W.D. Va. 1970); and *Williams* v. *U.S.* 323 F.2d 90 (10th Cir. 1963).

The petitioner has failed to establish in what manner the decision of the Kentucky Court of Appeals is at variance with any prior decision of this Court and other federal or sister state jurisdictions. To the contrary, the respondent submits that this contention presents no unsettled federal question and is in fact foreclosed to the petitioner because it properly falls within the prior con-

trolling decision of *Jones,* supra. This being so, the respondent submits that the petitioner has failed to establish a jurisdictional basis.

In summary, the respondent submits that the petitioner's application for Petition For Writ should be denied because it fails to meet the jurisdictional requirements of 28 U.S.C. 1257(3).

The respondent will not endeavor to respond to both of the above contentions as though these contentions are properly before the Court, even though respondent maintains that they are not.

QUESTIONS PRESENTED

I

Whether a police officer can examine a motor vehicle's identification number for purposes of identifying it without violating Fourth Amendment Rights Against An Unreasonable Search and Seizure, where he has legitimate grounds for doing so, not amounting to probable cause?

II

Whether one charged with the thievery of a stolen motor vehicle in violation of state statutory law has standing to object to the warrantless "search" of that vehicle for its vehicle identification number in violation of the Fourth Amendment provisions of illegal search and seizure?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Constitutional Provisions of the Fourth and

Fourteenth Amendments and Kentucky Revised Statute 433.220 have been properly set forth in petitioner's Petition For Writ at pages 4-5.

COUNTERSTATEMENT OF THE CASE

Petitioner complains that there was an illegal search of an impounded motor vehicle which he had been operating when the arresting officer, at a latter date, copied the secret vehicle identification number (CVIN) from underneath the chassis of the vehicle at the tow-in lot. The unique circumstances of this alleged "search" set this case apart from the usual search and seizure situation.

The petitioner was arrested for disorderly conduct and resisting arrest after having an altercation with a police officer on a deserted roadway. It was at this point that the arresting officer was advised by a companion police officer that the latter had information that the vehicle had been stolen as per his own independent investigation. Because both occupants of the vehicle were arrested and taken to jail, the officers had the right and the duty to have the vehicle impounded for safekeeping.

Once the vehicle was impounded, it was routine procedure for the law enforcement officials to check the serial number on the door post (PVIN) and the license plate number, which reflected that the vehicle was registered to the brother of the petitioner. The following day, the arresting officer learned where to locate the secret serial number (CVIN) on the underneath frame of the pickup truck. The number was copied and a trace in the National Crime Information Center (N.C.I.C.) lead to the discovery of the stolen nature of the vehicle. The

petitioner was tried and convicted in a Kentucky state court (the Nelson Circuit Court) of the offense of taking and operating a motor vehicle without the owner's consent, a felony (Kentucky Revised Statute 433.220). On appeal, the Kentucky Court of Appeals affirmed the judgment of convicted.

ARGUMENT

I

A LAW ENFORCEMENT OFFICER, HAVING LEGITIMATE GROUNDS FOR DOING SO ALTHOUGH NOT AMOUNTING TO PROBABLE CAUSE, MAY EXAMINE A MOTOR VEHICLE'S IDENTIFICATION NUMBER, WHETHER PLAINLY VISIBLE (PVIN) OR SECRETED UNDER THE CHASSIS (CVIN), FOR PURPOSES OF IDENTIFYING IT AND NOT THEREBY VIOLATE SEARCH AND SEIZURE RIGHTS SECURED BY THE FOURTH AMENDMENT.

Many federal circuits have consistently admitted evidence of a motor vehicle's identification number without a search warrant on the theory that the inspection which disclosed it was not a search within the meaning of the Fourth Amendment, or alternatively, that the search was reasonable, or that the accused lacked standing to contest it. *U. S. v. Ware*, 457 F.2d 828 (7th Cir. 1972); *U. S. v. Squires*, 456 F.2d 967 (2nd Cir. 1972); *U. S. v. Powers*, 439 F.2d 373 (4th Cir. 1971); *U. S. v. Williams*, 434 F.2d 681 (5th Cir. 1970); *U. S. v. Polk*, 433 F.2d 644 (5th Cir. 1970); *U. S. v. Johnson*, 413 F.2d 1396 (5th Cir. 1969); *U. S. v. Self*, 410 F.2d 984 (10th Cir. 1969); *U. S. v. Graham*, 391 F.2d 439 (6th Cir. 1968);

Cotton v. *U. S.*, 371 F.2d 385 (9th Cir. 1967). Contrastingly, only one federal circuit court of appeals, in a 4-2 decision, has held a warrantless search to be illegal--and the number of inadmissible in evidence—when the vehicle's inspection was not incident to a lawful arrest. *Simpson* v. *U. S.*, 346 F.2d 291 (10th Cir. 1965). Respondent would point to the dissenting opinion of Judges Pickett and Murrah in *Simpson*, id. at page 296 as the correct interpretation of the law regarding this issue, which is in accord with the decisions of the other circuits.

Two significant factors affecting the legality of a search for identification numbers are first, the mobility of a motor vehicle, see *Carroll* v. *U. S.*, 267 U.S. 132, 69 L.Ed.543, 45 S.Ct. 280 (1925); and second, the "expectation of privacy" that a person may reasonably claim for those parts of his vehicle where identification numbers are posted. Cf. *Katz* v. *U. S.*, 389 U.S. 347, 19 L.Ed.2d 576, 88 S.Ct. 507 (1967) (Mr. Justice Harlan concurring).

This Court has long distinguished the search of automobiles from the search of buildings. But mobility alone does not justify unbridled search of those parts of a vehicle where one has a reasonable expectation of privacy. Thus, warrantless searches of the trunk, the glove compartment, the console or similar areas have been approved only within strict limitations, such as the requirement of probable cause to search the car, Chambers v. Maroney, 399 U.S. 42, 26 L.Ed. 2d 419, 90 S.Ct. 1975 (1970), or a search incident to a lawful arrest. *Preston* v. *U. S.* 376 U.S. 364, 11 L.Ed. 2d 777, 84 S.Ct. 881 (1964); or a showing the car itself was contraband,

Cooper v. *California*, 386 U.S. 58, 17 L.Ed 2d 730, 87 S.Ct. 788 (1967).

In *Harris* v. *U. S.*, 390 U.S. 234, 19 L.Ed.2d 1067, 88 S.Ct. 692 (1968), a search of a vehicle was upheld where the officer went to the lot where the vehicle was impounded to secure its contents. The officer there opened the door of the vehicle and found incriminating evidence of a crime in plain view. Also, in *Cady* v. *Dombroski*, 413 U.S. 433, 37 L.Ed.2d 706, 93 S.Ct. 2523 (1973), this Court upheld the search of the trunk of an impounded vehicle. Further in *Cardwell* v. *Lewis*, U.S., 41 L.Ed.2d 325, 94 S.Ct. 1974), a limited warrantless "search" of the tire on the wheel and the taking of paint scrapings from the exterior of the vehicle were deemed not an unreasonable invasion of the right to privacy.

Inspection of a car's identification number differs from a search of a vehicle and seizure of its contents in one important aspect. The occupants of the car cannot harbor an expectation of privacy in the serial number. States require manufacturers to identify vehicles by affixing identification numbers which are quasi-public information, and the viewing of such numbers is but a minimal invasion of one's privacy. A police officer, therefore, should be freer to inspect the numbers without a warrant than he is to search a car for purely private property.

Therefore, because of the substantial weight of federal authority, where there is a legitimate reason to do so, the mere checking of the serial number of an automobile in order to more positively identify it, is not a search

within the prohibition of the Fourth Amendment. Manufacturers are required to place serial numbers on vehicles as an aid in identifying them. An automobile runs and stops on the public roads, where viewers may crawl under it or press their faces against its windows. Its exterior and much of its interior are within the plain view of the casual or purposeful onlooker, and thus are not protected by the Fourth Amendment from searching eyes. Opening the car door, looking under the hood, or crawling under the car to inspect the secreted VIN number does not independently bring an inspection of the VIN within the scope of the Fourth Amendment. Moreover, even if such an investigation is considered to be a "search," it is argued that it is a reasonable one where the searcher has reliable information to believe that a vehicle of like kind has been stolen. The arresting officer was informed that the pickup truck was stolen as per information from a companion police officer who had made an independent investigation. There could scarcely be a more appropriate case for identifying a motor vehicle's identification number. The number in itself is not evidence of a crime, but it may lead to the identity of the true owner. So long as the inspection is justified, not based on an inarticulate hunch, and is not a pretext for an exploratory search, it is well within the concept of reasonableness which defines the essential Fourth Amendment boundary within which law enforcement officers must proceed.

II

ONE CHARGED WITH THE THIEVERY OF A STOLEN MOTOR VEHICLE IN VIOLATION OF STATE STATUTORY LAW HAS NO STANDING TO OBJECT TO THE "SEARCH" OF THAT VEHICLE FOR ITS IDENTIFICATION NUMBER ON THE BASIS OF THE FOURTH AMENDMENT.

No one contends in this case that the petitioner owned or had a possessory right of any kind in the automobile. The motor vehicle had been stolen. Petitioner had no right to be in it in the first place and he had no right to forbid anyone to enter it. He offered no proof of his right of possession. Courts should always be diligent in preventing the lowering of the barriers which protect the individual liberties of our citizens, but in the exercise of this diligence the personal and property rights of members of the public should not be overlooked for the benefit of those who have regard for neither.

The overwhelming weight of authority and the better reasoning are represented by the cases which hold squarely that a thief has no "standing" in a stolen automobile. Even more compelling than the precedent from other jurisdictions in accord with the decision of the Kentucky Court of Appeals, however, is the inherent logic of the proposition. No valuable social purpose or constitutional significance could conceivably be served by extending the protection of the Fourth Amendment to a thief in the enjoyment of a stolen automobile.

CONCLUSION

The issues presented by the petitioner alleging a denial of federally protected constitutional rights have been raised in the courts below and were resolved adversely to petitioner's contentions. Thus they may not be a basis for the granting of certiorari review. Moreover, the petitioner has failed to meet the jurisdictional requirements of 28 U.S.C. §1257(3). Furthermore, petitioner has failed to establish that the issues he now presents actually involve any real significant conflict of decisions between or among other state or federal courts. For the foregoing reasons, the respondent requests that the petition for writ of certiorari be dismissed.

Respectfully submitted,

ED W. HANCOCK
Attorney General

MILES H. FRANKLIN
Assistant Attorney General
Capitol Building
Frankfort, Kentucky 40601

COUNSEL FOR RESPONDENT

PROOF OF SERVICE

I, Miles H. Franklin, counsel for respondent herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that on the 16th day of January, 1975, I served the petitioner with Brief for Respondent in Opposition, by placing 6 copies of the same in the United States mail, first class postage prepaid, and addressed to Hon. John G. O'Mara, 607 West Ormsby Avenue, Louisville, Kentucky 40203; and Hon. Joseph A. Biagi, 726 Main Street, Shelbyville, Kentucky 40065, Counsel for Petitioner.

Miles H. Franklin

Miles H. Franklin
Assistant Attorney General
Capitol Building
Frankfort, Kentucky 40601
Counsel for Respondent